a

CHOO CHENG LIEW

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR

b EUSOFF CHIN CJ
EDGAR JOSEPH JR. FCJ
WAN ADNAN ISMAIL FCJ
[CRIMINAL NO: 06-5-95]
25 SEPTEMBER 1996

c

CRIMINAL PROCEDURE: *Section 66(1) (repealed) Courts of Judicature Act 1964 - Reference of questions of law to Federal Court - Appeal against conviction and a composite sentence of fine and imprisonment - Death of appellant during pendency of appeal - Effect - Whether appeal could be prosecuted by widow - Whether must necessarily abate - Criminal* d *Procedure Code ss. 283(1)(g), 320.*

CRIMINAL PROCEDURE: *Section 320 Criminal Procedure Code - Rule of abatement of criminal appeals - Whether applicable to appeals from a sentence of fine or a composite order of imprisonment and fine.*

e

This was a reference to the Federal Court made under the repealed s. 66 Courts of Judicature Act 1964. The accused in the Court below ('the deceased') was convicted of an offence under s. 4(a) Prevention of Corruption Act 1961, and was sentenced by the Sessions Court to a day's imprisonment and a fine of RM4,000. He was also ordered to pay a penalty of RM500 to f the Government. The deceased paid the fine and the penalty, and thereafter appealed against the conviction. The deceased, however, passed away while the appeal was pending, whereupon his widow, the named appellant herein, sought to prosecute the appeal on his behalf. The appellate Judge ruled that the effect of the death on the appeal was to finally abate the same having g regard to s. 320 Criminal Procedure Code. According to the learned Judge, the widow had no legal interest in the outcome of the appeal, and hence the *locus standi* to prosecute the same. His Lordship was also of the view that there was no provision in the Malaysian Penal Code such as found in s. 70 of the Indian Penal Code, thereby making the finding he made irresistable.

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Before the Federal Court, the following questions of law were posed for its determination:

(i) whether, by reason of s. 320 of the Criminal Procedure Code ("our Code"), an appeal by an accused to the High Court from conviction i and a composite sentence of fine and imprisonment passed against

him by the Sessions Court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss. 4(a) and 3(a), respectively, of the Prevention of Corruption Act 1961 ('the Act'), finally abates on the death of the appellant during the pendency of the appeal.

(ii) whether the legality or propriety of such composite sentence of fine and imprisonment necessarily involves an examination of the validity of the conviction itself.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The learned Judge was in error when he held that there was no equivalent in our Laws to s. 70 of the Indian Penal Code. Section 283(1)(g) of our Criminal Procedure Code is indeed *in pari materia* with s. 70 of the said Code.

[2] Had the learned appellate Judge not misdirected himself as aforesaid, he would undoubtedly have regarded Indian case law as persuasive, since s. 431 of the Indian Criminal Procedure Code (V of 1898) (repealed and replaced by s. 394 of the Code of Criminal Procedure), is equivalent to s. 320 of our Criminal Procedure Code.

[3] The effect of s. 320 of our Code is that the following appeals to the High Court abate on the death of the accused during the pendency of the appeal, namely (i) appeals by the Public Prosecutor when an accused person has been acquitted pursuant to s. 306 of our Code, and (ii) appeals against conviction where the only sentence imposed is that of imprisonment.

[4] The rule of abatement of criminal appeals contained in s. 320 of our Code does not apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine.

[5] When considering appeals which survive notwithstanding the death of the accused during their pendency, the legality or propriety of the sentence of fine is open to challenge and, consequently, the validity of the conviction is also open to challenge. It follows that, if the conviction is unsustainable, the sentence, whatever it may be, would have to be set aside.

[6] We must answer the questions of law aforesaid in favour of the widow, that is to say, the first question in the negative and the second question in the positive, and restored the appeal for hearing on the merits before the High Court.

[Questions answered in favour of widow/appellant. Order accordingly]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR JENAYAH: *Seksyen 66(1) (dimansuhkan) Akta Mahkamah Kehakiman 1964 - Rujukan persoalan undang-undang kepada Mahkamah Persekutuan - Rayuan terhadap sabitan dan hukuman komposit denda dan pemenjaraan - Kematian perayu ketika rayuan menanti penyelesaian - Kesan - Samada rayuan boleh didakwa oleh balu - Samada harus diberhentikan - Kanun Prosedur Jenayah ss. 283(1)(g), 320.*

PROSEDUR JENAYAH: *Seksyen 320 Kanun Prosedur Jenayah - Kaedah pemberhentian rayuan-rayuan jenayah - Samada boleh dipakai kepada rayuan-rayuan daripada hukuman denda atau perintah komposit pemenjaraan dan denda.*

Ini merupakan suatu rujukan kepada Mahkamah Persekutuan yang dibuat di bawah s. 66 Akta Mahkamah Kehakiman 1964 yang telah dimansuhkan. Tertuduh ('simati') dalam Mahkamah di bawah telah disabitkan dengan satu kesalahan di bawah s. 4(a) Akta Pencegahan Rasuah 1961, dan telah dijatuhkan hukuman penjara selama satu hari dan denda sebanyak RM4,000 oleh Mahkamah Sesyen. Beliau telah juga diperintahkan supaya membayar penalti sebanyak RM500 kepada kerajaan. Simati telah membayar denda serta penalti itu, dan selepas itu telah merayu terhadap sabitan. Simati, walaubagaimanapun, telah mati ketika rayuan itu sedang menantikan penyelesaian, lalu balunya, perayu yang dinamakan di sini, telah berusaha untuk mendakwa rayuan itu bagi pihaknya. Hakim rayuan memutuskan bahawa kesan akhir kematian itu ke atas rayuan adalah membuatkan rayuan tersebut terhenti memandangkan peruntukan s. 320 Kanun Prosedur Jenayah. Menurut Hakim yang bijaksana, balu simati tidak mempunyai kepentingan undang-undang dalam keputusan rayuan itu, dan oleh itu tidak mempunyai *locus standi* untuk mendakwanya. Yang Arif juga berpendapat bahawa tidak terdapat peruntukan-peruntukan dalam Kanun Keseksaan Malaysia sepertimana yang terdapat dalam s. 70 Kanun Keseksaan India, dan ini menjadikan keputusan yang telah dibuatnya sesuatu yang tidak dapat dielakkan.

Di hadapan Mahkamah Persekutuan, persoalan undang-undang yang berikut telah dikemukakan untuk penentuannya:

(i) samada, atas alasan s. 320 Kanun Prosedur Jenayah, sesuatu rayuan oleh tertuduh kepada Mahkamah Tinggi terhadap sabitan dan suatu hukuman komposit denda dan pemenjaraan yang telah dijatuhkan terhadapnya oleh Mahkamah Sesyen, berhubung dengan kesalahan-kesalahan meminta dan menerima rasuah yang melanggari ss. 4(a) dan 3(a) Akta Pencegah Rasuah 1961 masing-masingnya, akan terhenti secara muktamadnya dengan kematian perayu ketika menanti penyelesaian rayuan.

(ii) samada keesahan atau kesesuaian hukuman komposit denda dan pemenjaraan yang sedemikian semestinya melibatkan suatu pemeriksaan akan keesahan sabitan itu sendiri.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Hakim yang bijaksana adalah salah pertimbangan bilamana beliau memutuskan bahawa tidak terdapat persamaan dalam Undang-Undang kita kepada s. 70 Kanun Keseksaan India. Seksyen 283(1)(g) Kanun Prosedur Jenayah kita adalah *in pari materia* dengan s. 70 Kanun tersebut.

[2] Sekiranya Hakim rayuan yang bijaksana tidak tersalah arah akan dirinya sendiri sepertimana yang tersebut di atas, beliau tanpa diragui tentunya akan menganggap kes undang-undang India sebagai bersifat persuasif, oleh kerana s. 431 Kanun Prosedur Jenayah India (V of 1898) (dimansuhkan dan diganti oleh s. 394 Kanun Prosedur Jenayah), adalah bersamaan dengan s. 320 Kanun Prosedur Jenayah kita.

[3] Kesan s. 320 Kanun kita adalah bahawa rayuan-rayuan kepada Mahkamah Tinggi yang berikut akan terhenti dengan kematian tertuduh ketika menantikan penyelesaian rayuan, iaitu (i) rayuan-rayuan oleh Pendakwa Raya apabila seseorang tertuduh telah dibebaskan selaras dengan s. 306 kanun kami, dan (ii) rayuan-rayuan terhadap sabitan di mana satu-satunya hukuman yang dikenakan adalah pemenjaraan.

[4] Kaedah pemberhentian rayuan-rayuan jenayah yang terkandung dalam s. 320 Kanun kita tidak terpakai kepada rayuan-rayuan terhadap hukuman denda atau perintah komposit hukuman yang menyatukan pemenjaraan substantif dengan denda.

[5] Ketika menimbangkan rayuan-rayuan yang masih hidup selepas kematian tertuduh ketika menanti penyelesaiannya, keesahan hukuman denda itu terbuka kepada cabaran dan, berikutan itu, keesahan sabitan juga terbuka kepada cabaran. Ianya mengikut bahawa, jika sabitan itu tidak dapat dipertahankan, hukuman itu, walau apa sekali pun, haruslah diketepikan.

[6] Kami mesti menjawab persoalan-persoalan undang-undang yang tersebut di atas bagi pihak balu si mati, iaitu, persoalan pertama secara negatif dan persoalan kedua secara positif, dan mengembalikan rayuan untuk pembicaraan atas merit-merit di hadapan Mahkamah Tinggi.

[Persoalan-persoalan dijawab memihak kepada balu/perayu. Perintah sekadarnya.]

Case referred to:
Harnam Singh v. The State of HP AIR [1975] 236

Legislation referred to:
Courts of Judicature Act 1964, s. 66(1)
Courts of Judicature (Amendment) Act 1995, s. 11
Criminal Procedure Code, ss. 283(1)(g), 301, 320
Criminal Procedure Code (V of 1898) [India], s. 43
Criminal Procedure Code 1973 [India], s. 394
Interpretation Act 1948 & 1967, s. 30
Penal Code [India], ss. 70, 71,
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4, 13

For the appellant - Ranjit Singh (J.S. Olikh with him); M/s. Ranjit Singh & Co.
For the respondent - Zulkifli Bahal; Deputy Public Prosecutor

JUDGMENT

Edgar Joseph Jr. FCJ:

This reference under s. 66(1) of the Courts of Judicature Act 1964 came before us on 30 July 1996, for the determination of the following questions of law:

(1) Whether, by reason of s. 320 of the Criminal Procedure Code ('our Code') an appeal by an accused to the High Court from conviction and a composite sentence of fine and imprisonment passed against him by the Sessions Court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss. 4(a) and 3(a), respectively, of the Prevention of Corruption Act 1961 ('the Act') finally abates on the death of the appellant during the pendency of the appeal?

(2) Whether, the legality or propriety of such composite sentence of fine and imprisonment necessarily involves an examination of the validity of the conviction itself?

At the outset, we have to point out that s. 66 of the Court of Judicature Act 1964 was repealed by the Courts of Judicature (Amendment) Act 1995 (Act A909) s. 11, but the repeal does not affect the present reference, by reason of s. 30 of the Interpretation Act 1948 and 1967 (Consolidated and Revised – 1989).

The background facts which gave rise to this reference may be shortly stated:

The accused Sunny Yap Eu Leong ('the deceased') a Settlement Officer, had first appeared on 18 December 1989, before the Sessions Court Judge, Kuala Kangsar, when he was charged with two offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss. 4(a) and 3(a)(ii), respectively, of the Act. He claimed trial to both charges.

In due course, his case was heard and after a series of broken hearings ending on 5 September 1992, when the defence closed its case and final submissions were heard, the Sessions Judge convicted the deceased of the charge of corruptly accepting a gratification but acquitted him of the soliciting charge. The sentence passed against him in respect of the offence of accepting a gratification, was One day's imprisonment and a fine of RM4,000 in default to one year's imprisonment. He was also ordered to pay a penalty of RM500 to the Government of Malaysia, pursuant to s. 13 of the Act which provides that the penalty shall be recoverable as a fine. He paid both the fine and the penalty. Both the deceased and Public Prosecutor appealed. The former against conviction and the latter against the sentence as being manifestly inadequate.

On 14 December 1993, the Public Prosecutor withdrew his appeal against sentence so that what remained was the appeal against conviction by the deceased.

In the event, on 21 November 1993, while the appeal was still pending and before the hearing thereof had commenced the deceased died.

Some 17 months later, more particularly, on 17 February 1994, when the appeal came on for hearing, at the High Court, Taiping, the widow of the deceased Choo Cheng Liew, informed the learned appellate Judge, in open Court, of the death of her husband, whereupon, the Deputy Public Prosecutor submitted that the effect of the death on the appeal was finally to abate the same having regard to s. 320 of our Code which provides:

> 320. Every appeal under s. 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

In a long and careful judgment, the learned appellate Judge discussed Indian and English case law. As regards the Indian cases which were cited by Counsel he said this:

> The three Indian cases referred by the learned Counsel for the widow were decided in the context of s. 70 of the Indian Penal Code and certainly could not and should not be adopted when interpreting s. 320 of the CPC. Our Malaysian Penal Code do not have the equivalent of s. 70 of the Indian Penal Code. These three Indian cases show a singular principle in that the representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a "sentimental interest", for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao* [1964] SC 1645).

As regards the English cases, his Lordship said this:

> On the other end of the scale, under the English law, a fine is in the nature of a monetary penalty which is due to the Crown, and when a man is sentenced to pay a fine, there at once arises a debt of record (that is, by judgment) to the Crown. Thus, where an accused was sentenced to imprisonment and fine and the sentence also provided for imprisonment in default of payment of fine, and when the accused died while serving the imprisonment without paying the fine, it was held that the fine could be recovered by the Crown from the personal representatives of the accused even after his death (*H.M. Treasury v. Harris [1957] 2* All ER 455*). In Hodgson v. Lakeman* [1943] 1 KB 15), a fine of 35s. was imposed on Hodgson after the Court convicted him, in his capacity as a Council's clerk, for an offence committed by the Cumberland County Council for breaching the Lighting (Restrictions) Order 1940. Hodgson entered an appeal against his conviction and on his application the justices stated a case, but he died before the appeal could be heard by the High Court. In a short judgment, Viscount Caldecote CJ held that when an appeal to the High Court against a conviction by justices has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the Court has jurisdiction to allow the executors to prosecute the appeal. In contrast would be the case of *R v. Rowe* [1955] 2 All ER 234, where Ivor Clyde Rowe was convicted at Bedford County Quarter Sessions on 18 February 1955, of false pretences and sentenced to eighteen months' imprisonment. On 21 February 1955, he gave notice of application for leave to appeal against conviction, but on the night of 6/7 March 1955, he died in prison. His widow now applied for leave to continue his application. Lord Goddard CJ after referring to *Hodgson v. Lakeman (supra)* held that the sentence being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the Court's allowing them to continue the appeal, and accordingly the application was refused.

His Lordship then concluded:

> Likewise, in the present appeal, the widow has no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased appellant before his death and without the benefit of an equivalent provision like s. 70 of the Indian Penal Code, the widow has no *locus standi* to prosecute this appeal.

Finally, his Lordship said this:

> Thus, the clear words in bracket of the second limb in s. 320 of the CPC refer only to an appeal against a sentence of fine and cannot be read to include a composite sentence of both imprisonment and a fine plus a penalty like the present appeal. Clearly, therefore the death of the appellant brought an immediate end to his appeal.

The widow being desirous of pursuing the appeal applied for leave to do so and also to refer the questions of law hereinbefore mentioned for the determination of the Supreme Court ('the predecessor of this Court'). Both applications were granted on 3 April 1995.

At the conclusion of the arguments before us, we answered the questions of law aforesaid in favour of the widow, that is to say, the first question in the negative and the second question in the affirmative, and restored the appeal for hearing on the merits before the High Court, Taiping. We intimated then that we would give our reasons later.

With respect, the learned appellate Judge was in error when he held that there was no equivalent in our laws to s. 71 of the Indian Penal Code. Section 283(1)(g) of our Code is, indeed, *in pari materia* with s. 71 of the Indian Penal Code for it provides:

> 283(1) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say):
>
> (g) the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.

Had the learned appellate Judge not misdirected himself as aforesaid, he would undoubtedly have regarded Indian case law as persuasive since s. 431 of the Indian Criminal Procedure Code (V of 1898) (repealed and replaced by s. 394 of the Code of Criminal Procedure 1973,) is equivalent to s. 320 of our Code which provides:

> 320. Every appeal under s. 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

Section 306 of our Code provides:

> 306. When an accused person has been acquitted by a Magistrate there shall be no appeal except by, or with the sanction in writing of, the Public Prosecutor.

In our view, the effect of s. 320 of our Code may be stated thus:

> The following appeals to the High Court abate on the death of the accused during the pendency of the appeal:

(1) appeals by the Public Prosecutor when an accused person has been acquitted pursuant to s. 306 of our Code, and

(2) appeals against conviction where the only sentence imposed is that of imprisonment.

The rule of abatement of criminal appeals contained in s. 320 of our Code does **not** apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine.

When considering appeals which survive notwithstanding the death of the accused during their pendency, the legality or propriety of the sentence of fine is of course, open to challenge and, consequently, the validity of the conviction is also open to challenge. It follows that if the conviction is unsustainable, the sentence, whatever it may be, would have to be set aside.

In enunciating the above principles, we gratefully acknowledge the assistance we have derived from the judgment of Chandrachud J (as he then was) in *Harnam Singh v. The State of HP* AIR [1975] 236, which is precisely in point.

Reported by W.A. Sharif